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Navigational Servitude: An Old Concept With A New Limitation

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tradition, or perhaps what might better be called a policy, rather than taking the more common place approach to the problem of statutory construction. Perhaps so much similarity between the Death on the High Seas Act, especially Section Seven, and the broad contours of state concurrent jurisdicton presented to the court's mind a compelling image of grand moment and handsome symmetry. Perhaps the court took repose in its vision. There is more concrete explanation of the court's decision in terms of New York precedent, the use of legislative history by plaintiffs' counsel, and the court's zealous concern over its own powers.

If the court's decision can properly be criticized, their fellow travelers must be the draftsmen of the Act and even Congress, itself. Perhaps the draftsmen should have said "We really mean it" so that the courts would disregard the apparent tradition of concurrent jurisdiction. Certainly Congress should have averted, not compounded, the confusion built into the act by the deliberately ambiguous amendment of Section Seven. Careless wording and seeming tradition produced the problem of forum in the Act. Decision makers and law makers might well heed this caveat:

> Men and not monsters warp the bounds of the sea.
> Yet may not thoughtless men still monsters be?
> Not fate but men
> Unlock the energies of the rock.[57]

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NAVIGATIONAL SERVITUDE: AN OLD CONCEPT WITH A NEW LIMITATION

The Federal Government, through its sovereign power of eminent domain, has the right to acquire private property for public use.[1] The Fifth Amendment requires the Government to compensate the owner of property thus appropriated.[2] Through authority given it by the commerce clause of the Constitution, the Government also has the power of navigational servitude.[3] Navigational servitude, also termed "dominant servitude"[4] or "superior navigation easement,"[5] allows the Government to control the navigability of an interstate waterway by regulating its flow.[6] This regulation contemplates the acquisition of private property. The power of navigational servitude, like that of eminent domain, is superior to private interests.[7] However, unlike

57. Howard Baker, Ode to the Sea, in Oxford Book of American Verse 1017 (1960).

1. Adirondack Railway Co. v. New York State, 176 U.S. 335, 346 (1900).
2. Id. at 347.
3. United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).
4. Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954).
5. United States v. Grand River Dam Authority, 363 U.S. 229, 231 (1960).
6. United States v. Commodore Park, 324 U.S. 386, 390 (1945).
7. United States v. Twin City Power Co., supra note 3, at 225.

appropriation through eminent domain, acquisiton of property through this power does not make the Government liable to the owner for payment of compensation.[8] The reason for this difference is that when the Government invokes this power it is not "taking" property under the Fifth Amendment, but rather it is "exercising its paramount power in the interest of navigation."[9] This reasoning is more than a mere play on words. A private individual's rights in a navigable interstate waterway are always limited by the public interest in such a waterway.[10] Perhaps another way to view navigational servitude would be to term the individual's use of such a waterway as a *privilege* extended by the Government which can be retaken without compensation.

The Governmental power of navigational servitude is *not* a new concept. Very early it was held that the power of Congress over interstate commerce allows it to regulate interstate navigation.[11] From this it was reasoned that the Government has a right to control interstate navigable waterways.[12] This control may be effectuated in many ways. In the name of navigational servitude, the Government may destroy property by permanently raising the level of the stream to its high water mark[13] or by removing structures within the stream bed.[14] The Government can deprive the riparian owner of his access to deep water by building a structure within the streambed.[15] It can even make a navigable waterway non-navigable by depositing material in the stream and still incur no liability to the riparian owner.[16] The Government can use this power to accomplish more than the mere control of traffic.[17] Through navigational servitude, the Government can appropriate land in an effort to improve flood control and to establish hydroelectric projects.[18]

However, there are limitations upon the power of navigational servitude. It can only be exercised over lands *below* the high water mark of the stream.[19] Therefore, this power does *not* allow the Government to take lands *above* the high water mark known as fast lands.[20] When the Government takes fast lands, it must do so through its power of eminent domain and, therefore, pay the owner just compensation. A determination of the stream's non-navigability also restricts the Government's power of navigational servitude. The Supreme Court in *United States v. Appalachain Power Co.* outlined several rules which

8. United States v. Commodore Park, supra note 6.
9. United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).
10. Ibid.
11. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
12. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724, 725 (1865).
13. United States v. Chicago, M., St. Paul & Pac. R.R., 312 U.S. 592 (1941).
14. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).
15. Scranton v. Wheeler, 179 U.S. 141 (1900).
16. United States v. Commodore Park, 324 U.S. 386 (1945).
17. United States v. Appalachian Power Co., 311 U.S. 377 (1940).
18. Ibid.
19. United States v. Chicago, M., St. Paul & Pac. R.R., supra note 13.
20. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).

can be used in making this determination.[21] The particular physical features of each stream must be checked carefully. A stream may be considered navigable even if artificial aids are necessary to allow *commercial* vessels to travel its course. If the improvements are reasonable, as determined by cost and need, then the stream is considered navigable even though the improvements have not already been made. Once it is concluded that a stream is navigable, it retains that status even though it may not be used for navigation. It should be noted that in determining whether a particular stream is navigable the term navigable is broadly construed, and most streams will be found to come within this category.

In 1956, in *United States v. Twin City Power Co.*, the Supreme Court ruled that though this power of the Government does not extend beyond the high water mark, it may affect the *amount* of compensation payable for the taking of fast lands.[22] The Court held that any value of the fast lands derived from the employment of "the flow of the stream" need *not* be paid for when the Government acquires fast land together with the stream bed.[23] In other words, the Government does not have to pay for the value of the riparian uses of the fast lands.[24] An example of the effect of this ruling can be drawn from the Twin City case itself where it was held that when the fast land has value as a dam site, the Government does not have to pay the owner for *that aspect* of its value.[25]

In *United States v. Virginia Electric and Power Company*, the Government attempted to extend the power of navigational servitude to acquire a flowage easement over fast land adjoining a navigable river.[26] The Government desired to build a dam and use this land for a reservoir. After entering an agreement with the fee owner, the Government took the flowage easement through its power of eminent domain. The fee owner accepted a one dollar payment as compensation for the easement because she hoped to develop a wild game preserve around the proposed artificial lake. The fee owner had *previously* sold a flowage easement over part of the same fast land taken by the Government to the Virginia Electric and Power Company.

There is no question about the fact that the power company's flowage easement, i.e., its right to flood the land by construction of a dam, is a property right.[27] The power company, being deprived of its easement, demanded that it be paid just compensation by the Government. The power company was awarded damages by the District Court and this judgment was affirmed

21. Supra note 17.
22. Supra note 3, at 227.
23. Ibid.
24. United States v. Twin City Power Co., 350 U.S. 222 (1956).
25. Ibid.
26. 365 U.S. 624 (1961).
27. Accord, Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 618 (1935); Western Union Tel. Co. v. Pennsylvania R.R. Co., 195 U.S. 540, 570 (1904).

by the Court of Appeals.[28] Due to the decision in the *Twin City* case, which excludes from the determination of damages any value of the fast land derived from "the flow of the stream," the Supreme Court remanded with instructions to eliminate any value arising from the land's availability for water power purposes from the award.[29] The District Court appointed Commissioners to determine the power company's damages in accordance with the *Twin City* doctrine. The Commissioners, finding the value of the *non-riparian* uses of the land, assessed the power company's damages. The District Court accepted their findings and entered judgment which was affirmed by the Court of Appeals.[30]

The Government, though it acquired the flowage easement from the fee owner by its power of eminent domain, appropriated the power company's easement through its power of navigational servitude. It argued that the easement had no compensable value since its value was completely dependent on riparian uses. Therefore, the Government contended, that under the *Twin City* doctrine it need pay nothing for the taking of the easement. The power company agreed with the Government that the value of the easement derived from the riparian uses should not be included in the determination of the easement's value. However, the power company claimed that the easement derived value from non-riparian uses; and the taking of it must be compensated for by the Government.

The Supreme Court in a five to three decision, with Justice Douglas concurring, declared that there were non-riparian uses, the value of which must be compensated for by the government, but once again remanded the case to the District Court for determination of the power company's damages by a method other than that used by the lower courts in reaching their decision.[31] The Court found that the non-riparian uses of land included employment for agriculture, timber, and grazing. It ruled that the power company had a compensable right to destroy these uses by building a dam and flooding the land. The power company had paid valuable consideration for this right. A purchaser of the fee from the fee owner who desired to utilize one of the non-riparian uses of the land would obviously have to purchase the flowage easement from the power company. Reasoning that since the Government must pay the fee owner for the taking of non-riparian uses,[32] the Court ruled that it also must pay the power company for the taking of his property right to destroy such non-riparian uses. The Court pointed out that if this were not true, the Government could take the property interest free from any monetary obligation because the fee owner had already sold the flowage easement, and the power

28. United States v. 2979.72 Acres, 218 F.2d 524 (4th Cir. 1955).
29. United States v. Virginia Electric and Power Co., 350 U.S. 956 (1956).
30. United States v. 2979.72 Acres, 270 F.2d 707 (4th Cir. 1959).
31. United States v. Virginia Electric and Power Co., supra note 26.
32. United States v. Kansas City Life Ins. Co., supra note 20.

company could not sue because under the Government's theory its easement would be worthless.

The Court decided that the lower court had correctly applied the *Twin City* doctrine and had rightly assessed the value of the easement taken by the government. To find this value, the lower court deducted the value of the property after the Government's acquisition of the easement from the value of the property before the acquisition.[33] However, the Court could not agree with the lower court's procedure for apportioning the value of the easement between the fee owner and the power company. Having made an agreement with the Government, the fee owner gave up her interest in the easement; therefore, the lower court awarded the total non-riparian value of the land to the power company.

The Supreme Court adopted a formula set out in *Augusta Power Co. v. United States* which values the non-riparian uses of the land and then adds a probability factor, the probability of the easement's exercise, to apportion the damages between the fee owner and the easement owner.[34] For example, if the flowage easement had already been exercised by the power company and the land was flooded then the probability of the exercise of the easement would be 100%. In this case, the total value of the non-riparian uses of the fast land would be awarded to the power company. On the other hand, if it was absolutely impossible to exercise the easement, the probabiliy of its exercise would be 0%; and the total non-riparian value of the fast land would be awarded to the fee owner.[35] The power company would not be compensated. Of course, generally the probability factor lies somewhere in between these two extremes and the damages would be apportioned more evenly between the fee owner and the easement owner. The Court made it clear that the taking of the easement by the Government must in no way affect the determination of this probability factor.

The dissent vigorously asserted that the power company deserved no compensation. Declaring that the easement was of no value when it was taken by the Government, the dissent emphasized the fact that the only right the flowage easement gave the power company was to flood the land by damming the river. To dam the river, the power company needed a federal license which up to the time of the acquisition by the government had never been issued. The taking of the easement by the Government under its power of navigational servitude made it impossible for the power company to exercise its rights.

The power to destroy non-riparian uses, the dissent concluded, is not a thing of value to an easement owner but only to a fee owner. Under the ruling of *United States v. Kansas City Life Ins. Co.*, the Government must pay the

33. United States v. 2979.72 Acres, supra note 30; see Olson v. United States, 292 U.S. 246, 253 (1934).

34. 278 F.2d 1 (5th Cir. 1960).

35. Note that in the instant case the fee owner, even in these circumstances, could only be awarded one dollar.

fee owner for taking of non-riparian uses,[36] but, the dissent argued, it is error to extend this ruling in order to compensate the easement owner. The easement owner, unlike the fee owner, could never utilize these non-riparian assets since it only had a right to flood the land by damming the river.

Further, because of the *Twin City* doctrine, the value of the riparian uses of the land cannot be used to determine the value of the easement. According to the dissent, the power company need not be compensated for the taking of its easement. "The question is what has the owner lost not what has the taker gained."[37] The dissent concluded that the power company had lost nothing which is compensable since the whole value of its easement was derived from the flow of the stream.

United States v. Virginia Power and Electric Co. will have an effect upon the theory of navigational servitude.[38] The cases that molded the definition of navigational servitude involved only the Government and fee owners as parties. In not allowing the power company to be recompensed for the value of the riparian value of the easement it would appear that the Court followed the *Twin City* doctrine. But there can be no doubt that in allowing the power company payment for the value of the non-riparian uses of the land, notwithstanding the probability factor, the Court has in fact limited the Government's power of navigational servitude.

In analyzing this decision, it appears that the Court was led to its conclusion by a theory that the flowage easement must have had some value to someone. The Court evidently believed that if the fee owner could not be compensated because she had already bargained away her right, then the power company must be compensated.

Limited by the *Twin City* doctrine, the Court was forced to rely on the theory of "the right to destroy" non-riparian uses in order to recompense the power company. Using the *Kansas City* case as its basis, the Court attempted to analogize the rights of the easement owner to those of the fee owner.[39] However, as the dissent pointed out, in this situation the easement owner just does *not* stand in the shoes of the fee owner. The power company unlike the fee owner never had any right to utilize the non-riparian assets of the land. Only the fee owner could have farmed this land; therefore, only the fee owner should have value in the right to destroy this use. The cases that the Court cites to support its theory only re-affirm that the Government must compensate the *fee owner*.[40] The Court gave no bona fide reason for extending this rule to easement owners.

The Government's contention that neither the fee owner nor the easement

36. Supra note 20.
37. Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910).
38. Supra note 26.
39. United States v. Kansas City Life Ins. Co., supra note 20.
40. United States v. Twin City Power Co., supra note 24; United States v. Kansas City Life Ins. Co., supra note 20.

owner were entitled to damages was found by the Court to be inequitable. However, as the dissent argued, the Government's position is really equitable and fair. The fee owner, having conveyed the flowage easement, has no right to bring a suit. The easement, as pointed out above is valueless; therefore, the power company should not be able to sue the Government.

Further, the formula derived from the *Augusta* case, used by the Court to apportion the damages between the fee owner and the power company, is based on a misconception.[41] The *Augusta* case, which involved an *easement owner* and the Government, derived its rationale from cases involving *fee owners* and the Government.[42] Therefore, by adopting the *Augusta* formula the Supreme Court's original mistake reoccurs in the test devised to apportion the damages between the fee owner and the power company. The dissent also argued that the *Augusta* formula could not be applied in this case because the fee owner's previous agreement with the government eliminated any possibility of apportionment of damages. The Court however understood and considered that the fee owner could get only one dollar.[43] It applied the test only to find the power company's award, to be derived by apportioning the value of the non-riparian uses of the land between the fee owner and the power company based upon the probability factor.

In attempting to determine the amount of damages, the District Court will undoubtedly have to take into consideration the fact that the power company failed to obtain a federal license to erect a dam. This may be considered to have made the exercise of the easement so remote as to make the power company's damages only nominal. If this does happen, then the Court and the dissent, so far apart in theory, will have reached the same result.

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41. Augusta Power Co. v. United States, supra note 34.
42. Ibid.
43. See, United States v. Virginia Power and Electric Co., supra note 26 at 632 n. 3:

> The owner of the fee, having agreed to convey her interest for one dollar, would, of course, not receive any larger amount apportioned to her interest.